CHRISTOPHER TAN KOK CHING

v.

BOLHASSAN DI (NO 2)

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[SUIT NO: 22-77-96(II)]
24 NOVEMBER 1998

BANKRUPTCY: *Capacity of bankrupt - Action by bankrupt - Steps taken without previous sanction of official assignee - Whether void - Commencement of bankruptcy and doctrine of relation back - Non-joinder of official assignee as co-plaintiff - Whether action invalidated - Whether right of action passed to official assignee - Bankruptcy Act 1967, ss. 38(1) & 47(1)*

CIVIL PROCEDURE: *Action - Action by bankrupt - Steps taken without previous sanction of official assignee - Whether void - Non-joinder of official assignee as co-plaintiff - Whether action invalidated - Whether right of action passed to official assignee - Bankruptcy Act 1967, ss. 38(1) & 47(1)*

The plaintiff who committed an act of bankruptcy on 4 October 1996, for which he was adjudged a bankrupt on 10 September 1997, had issued a writ against the defendant on 2 October 1996. On 7 January 1998, the plaintiff obtained the sanction of the Official Assignee ('the OA') for the action. The preliminary issues raised by the defendant were: (i) whether the acts or steps taken by the plaintiff as a bankrupt prior to obtaining the sanction of the OA were void; and (ii) whether the plaintiff's action could be maintained without the OA being joined as a party.

Held:

[1] All the steps taken by the plaintiff prior to obtaining the sanction of the OA were void. Any dealings by or with a bankrupt after the commencement of the bankruptcy is *prima facie* invalid and may be set aside.

[2] The plaintiff's right of action did not pass to the OA. Thus, the plaintiff could continue the action with the sanction of the OA. The non-joinder of the OA as a co-plaintiff did not invalidate the action.

[Both preliminary issues answered in the affirmative; costs in the cause.]

Case(s) referred to:
Abu Bakar Jaafar & Anor v. Malayan Banking Bhd [1991] 1 CLJ 492 ***(refd)***
Bennett v. Gangee [1877] 46 LJ QB 204 ***(refd)***
Eldridge v. Burgess [1878] 7 Ch D 411 ***(refd)***
Jackson v. North Eastern Railway Company [1877] 5 Ch D 844 ***(refd)***
Rickland Trade & Development Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1996] 4 MLJ 233 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 38(1), 47, (1)
Rules of the High Court 1980, O. 15 r. 7(1)

Other source(s) referred to:
Bankruptcy Law & Practice, GHL, Fridman, Hicks & Johnson, p 148
Halsbury's Laws of England, 4th edn, vol 3, paras 556 - 560

For the plaintiff - Shankar RP Asnani; M/s Yong & Co
For the defendant - Lim Lip Sze (HC Sim with him); Reddi & Co

Reported by Gan Peng Chiang

JUDGMENT

Muhammad Kamil Awang J:

There are two applications the morning, one by the plaintiff for an amendment of the statement of claim (encl. 71) and the other by the defendant for the production of the flowchart by the plaintiff for examination by a handwriting expert (encl. 77).

At the onset of the hearing, the defendant raised two preliminary issues for decision of the court, they are:

(1) are the acts or steps taken by a bankrupt before the sanction of the official assignee void; and

(2) can the action be maintained without the official assignee being joined as a party.

The plaintiff committed an act of bankruptcy on 4 October 1996, and was adjudged a bankrupt on 10 September 1997. The plaintiff had issued the writ against the defendant on 2 October 1996 and obtained the official assignee's sanction on 7 January 1998.

Learned counsel for the defendant submitted that as an undischarged bankrupt, all actions taken by him before he obtained the sanction by the official assignee are void. Having obtained the sanction of the official assignee, the official

assignee should be made a party to the action. He cited *Halsbury's Laws of England*, 4th edn. vol 3 paras. 556 to 560; *Jackson v. North Eastern Railway Company* [1877] 5 Ch D 844, CA; and *Eldridge v. Burgess* [1878] 7 Ch D 411.

Learned counsel for the plaintiff submitted that the writ was issued on 2 October 1997 and no further action was taken by the plaintiff. The claim was against the fraudulent transfer of shares by the defendant. By the affidavit of Christopher Tan Kok Ching affirmed on 5 February 1998 (encl. 98), the plaintiff had obtained the sanction of the official assignee to continue with the action. By the letter dated 2 March 1998, the official assignee had informed the plaintiff that it did not wish to be a co-plaintiff in the action.

By virtue of the provisions of s. 38(1) of the Bankruptcy Act 1967, an undischarged bankrupt may not maintain an action without the previous sanction of the official assignee. Section 38(1) Bankruptcy Act states:

> (1) Where a bankrupt has not obtained his discharge –
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.

Section 47 Bankruptcy Act states:

> (1) The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor, shall be deemed to have relation back to and commence at the time of the act of bankruptcy being committed on which a receiving order is made against him ...

Bankruptcy Law & Practice by GHL, Fridman, Hicks & Johnson, at p. 148 states that:

> ... If the cause of action arises after bankruptcy, it may be that the bankrupt, rather than his trustee, is the proper person to sue.

At p. 149:

> However not only is the time at which the right of action arises important. So is the nature of the action. The distinction between proprietary action and personal actions was drawn by Lord Abinger. C.B. in *Howard v. Crowther* [1841] 8 M & W 601, and was further elaborated by the House of Lords in *Beckham v. Drake* [1849] 2 HL Cas 579.

Under O. 15 r. 7(1) Rules of the High Court 1980 provides:

> (1) Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy.

It seems that as the plaintiff had issued the writ before he was adjudged a bankrupt, there is no necessity to withdraw the action but only to obtain the sanction of the official assignee which he subsequently secured on 20 January 1998. See *Rickland Trade & Development Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1996] 4 MLJ 233. All acts or actions of a bankrupt taken before the sanction of the Official Assignee are void.

In *Abu Bakar bin Jaafar & Anor v. Malayan Banking Bhd* [1991] 1 CLJ 492; [1991] 3 MLJ 487 the court held that upon the plaintiffs being adjudged a bankrupt the doctrine of "relation back" under s. 47(1) of the Act would apply to the defendant. Therefore any dealings by or with the bankrupt after the commencement of the bankruptcy is *prima facie* invalid and can consequently be set aside by the official assignee.

The answer to the first preliminary point raised is in the affirmative.

Halsbury's Laws of England, 4th edn, vol 3, para. 557;

> An action does not abate by the reason of the bankruptcy of a party, provided the cause of action survives. It the right of action which a bankrupt is enforcing is one which vests in his trustee, or is one which the trustee is entitled to enforce for the benefit of the creditors, the trustee may, on *ex parte* application by himself, or by any party to the action, to the court in which the action is pending alleging the devolution of the right of action, become a party to the action in place of the bankrupt or as co-plaintiff; but the bankrupt cannot continue the action alone.

A trustee who refused to continue an action commenced by the bankrupt is not barred from beginning an action in his own name for the same relief: *Bennett v. Gangee* [1877] 46 LJ QB 204, CA.

It seems that if the right of action which a bankrupt is enforcing is one which vests in the trustee ... the trustee may, on *ex parte* application by himself, or by any party to the action, to the court in which the action is pending, alleging the devolution of the right of action, become a party to the action in place of the bankrupt or as co-plaintiff. In such a case the bankrupt cannot continue the action alone.

In the present case, the right of action does not pass to the trustee (the official assignee) and as such the bankrupt, with the sanction of the official assignee, may continue with his action. The official assignee in his letter dated 2 March 1998 had informed the plaintiff that he did not wish to be a party to the action. In my view, the plaintiff's action, by not joining the official assignee as co-plaintiff, does not invalidate the action.

Therefore, the answer to the second point is in the affirmative.

Costs in the cause.